

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF CERTAIN )  
POLLUTION CONTROL TAX EXEMPTION )  
AND CREDIT APPLICATIONS MADE BY )  
KAISER ALUMINUM AND CHEMICAL )  
CORPORATION AND DISAPPROVED BY )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
KAISER ALUMINUM AND )  
CHEMICAL CORPORATION, )  
Appellant, )  
v. )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Respondent. )

PCHB No. 83-28

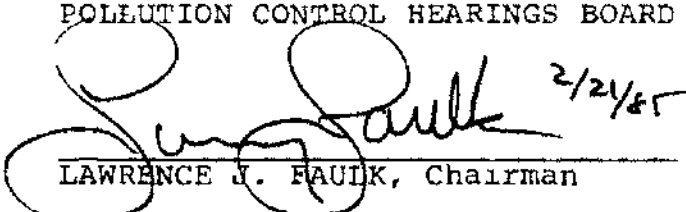
FINAL FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND ORDER

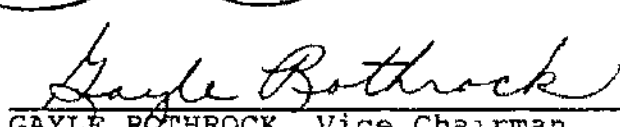
The Proposed Order having been entered in this matter on December 29,  
1984, (See Attached) and  
There being no exceptions thereto, and  
Two members of the Board being unable to agree, and,  
The third member having disqualified himself from participation, and

1 The appealing party having the burden of proof herein,  
2 NOW THEREFORE IT IS ORDERED, that pursuant to WAC 371-08-215  
3 of the Board's rules of practice and procedure the disapproval by  
4 Department of Ecology of Kaiser Aluminum and Chemical Corporation's  
5 application for tax exemption and credit (No. 1659) shall control  
6 as a matter of law.

7 DONE at Lacey, Washington, this 22<sup>nd</sup> day of February, 1985.

8 POLLUTION CONTROL HEARINGS BOARD

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10  2/21/85  
11 LAWRENCE J. FAULK, Chairman

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14 GAYLE ROTHROCK, Vice Chairman

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16 WILLIAM A. HARRISON  
17 Administrative Appeals Judge

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26 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER

27 PCHB No. 83-28

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Appellant, )  
v. )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Respondent. )

PCHB No. 83-28

PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

This matter, the appeal of pollution control tax exemption and credit applications disapproved by the Department of Ecology, came on for hearing before the Pollution Control Hearings Board, Gayle Rothrock, Chairman, and Lawrence J. Faulk, Vice Chairman, convened at Lacey, Washington, on January 26, 1984. Administrative Appeals Judge

Attachment

1 William A. Harrison presided. Respondent elected a formal hearing  
2 pursuant to RCW 43.21B.230.

3 Appellant appeared by its attorney Joanne Henry. Respondent  
4 appeared by Patricia Hickey O'Brien, Assistant Attorney General.  
5 Reporter Kim L. Otis recorded the proceedings.

6 Witnesses were sworn and testified. Exhibits were examined. From  
7 testimony heard and exhibits examined, the Pollution Control Hearings  
8 Board makes these

9 FINDINGS OF FACT

10 I

11 Appellant, Kaiser Aluminum and Chemical Corporation (Kaiser) owns  
12 and operates a primary aluminum reduction plant in Tacoma, Washington.

13 II

14 The plant includes potlines, known as Lines I and II, constructed  
15 in the 1940's.

16 III

17 In 1970, Department of Ecology (DOE) adopted chapter 18-52 WAC  
18 containing particulate and visible emission standards for primary  
19 aluminum plants, such as Kaiser. Kaiser's Lines I and II were not in  
20 compliance with the then newly adopted standards of DOE. Kaiser  
21 accordingly considered both upgrading Lines I and II or, as an  
22 alternative, replacing both Lines I and II with a modern Line V.  
23 These alternatives were embodied in applications for tax and credit  
24 certificates, respectively designated as application No. 511 (upgrade  
25 Lines I and II) filed in 1969 and application No. 971 (replacement of

26 PROPOSED FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB No. 83-28

1 Lines I and II with Line V) filed in 1971.

2 IV

3 Application No. 511 was approved by DOE and Lines I and II were  
4 upgraded by the addition of pollution control devices known as  
5 scrubbers. These were installed according to DOE's Regulatory Order  
6 No. 52-2 which contained a compliance schedule for meeting the  
7 emission standards. The schedule included dates for completion of  
8 engineering, ordering and installation of equipment and ultimate  
9 compliance with emission standards.

10 V

11 Application No. 971 for replacement of Lines I and II with Line V  
12 was neither approved nor disapproved by DOE. However, DOE indicated  
13 to Kaiser that test data was required upon completion of engineering  
14 as defined in the compliance schedule of Regulatory Order No. 52-2.  
15 Kaiser did not report to DOE the results of any test nor notify DOE of  
16 any engineering completed for Line V by the date for completion of  
17 engineering as defined in the compliance schedule of Regulatory Order  
18 No. 52-2.

19 VI

20 Through addition of the scrubbers to Lines I and II, Kaiser's  
21 plant-wide particulate emissions have been in compliance with DOE's  
22 standards, WAC 18-52-031(2) and WAC 173-415-030(3).

23 VII

24 Despite addition of the scrubbers to Lines I and II, the lines  
25 have emitted excessive visual emissions in violation of DOE's

26 PROPOSED FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
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standards, WAC 18-52-031(3) and WAC 173-415-030(4).

#### VIII

In January, 1980, Kaiser sought and obtained DOE's permission to construct six prototype prebake cells. These are the first phase of the new Live V which Kaiser proposes as the replacement for Lines I and II.

#### IX

During 1980, Lines I and II produced a number of visual emission violations. After imposing civil penalties for these, DOE informed Kaiser that, in the future, it would prefer to see correction action in lieu of further violations and enforcement. To this end DOE disclosed it would issue an order to Kaiser for corrective action, and invited Kaiser to communicate its views on the appropriate content for such an order.

#### X

By letter of September 5, 1980, Kaiser suggested certain operational changes for Lines I and II to reduce excessive emissions, and stated:

In addition to the operational changes we reviewed several possible equipment changes to assure continuous compliance. We recommend against the inclusion of any equipment change in the regulatory order because it would (1) take a minimum of 12 months after receipt of the regulatory order to make the equipment change or about January 1982, (2) cost in excess of \$500,000 and (3) only be useful for about three years before Lines I and II are shutdown. The possibility of using the equipment changes in Line V was reviewed and only the fan, motor and starter could possibly be used in Line V which is worth at most \$100,000; however, this would probably not be done because of problems in

1 scheduling and the possibility of lost production.  
2 (Emphasis added.)

3 XI

4 We find that Kaiser installed the first phase of Line V, intended  
5 to install the balance of Line V, and intended to abandon Lines I and  
6 II, all prior to DOE's order for corrective action (DE 81-490) which  
7 issued on August 10, 1981.

8 XII

9 The DOE order to Kaiser for corrective action (DE 81-490)  
10 prescribed operational, not equipment, changes to Line I and II. It  
11 further required of Kaiser;

12 1. A commitment to a course of action either to  
13 abandon operation of lines 1 and 2 or to upgrade  
these lines to achieve compliance will be made by  
January 31, 1983.

14 Any requirements for equipment additions to Lines I and II were thus  
15 held back by DOE in reliance upon Kaiser's stated intention to replace  
16 those lines with Line V. In return, however, DOE sought a commitment  
17 by Kaiser so that equipment additions to Lines I and II could be  
18 reconsidered if Kaiser postponed action upon or even repudiated its  
19 stated intention upon which DOE relied.

20 XIII

21 The Legislature terminated the pollution control tax exemption and  
22 credit program by enactment of legislation requiring all applications  
23 for certificates to be filed "not later than November 30, 1981." Laws  
24 1981, 2nd Ex. Sess. ch. 9. amending chapter 82.34 RCW.

XIV

On November 30, 1981, Kaiser filed application for a pollution control tax exemption and credit certificate (application No. 1659) for replacement of Lines I and II with Line V. Kaiser estimated the applicable cost, in 1981 dollars, as \$165,618, 000.

XV

By letter of January 24, 1983, Kaiser informed DOE that due to economy and energy situations, it had no timetable for completion of Line V to replace Lines I and II.

XVI

On March 1, 1983, having reviewed it, DOE disapproved Kaiser's tax credit application No. 1659. In doing so, DOE stated:

The proposed project is not being done in response to any order, permit or regulation of the department.

From this Kaiser appeals.

XVII

By letter of January 24, 1984, Kaiser informed DOE that due to economic developments, Kaiser cannot foresee circumstances developing in the short range (1-2 years) that would allow a commitment to complete Line V. No engineering plans for the completion of Line V have been requested by DOE nor furnished by Kaiser.

XVIII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these



1 CONCLUSIONS OF LAW

2 I

3 Statutory exceptions from taxing laws are construed narrowly.  
4 International Paper v. Revenue, 92 Wn.2d 277, 279, 595 P.2d 1310  
5 (1979), Evergreen-Washelli Memorial Park Co. v. Revenue, 89 Wn.2d 660,  
6 663, 574, P.2d 735 (1978). The burden of proof to show that a tax  
7 credit or exemption should apply is on the appealing party.

8 II

9 The test for approval or disapproval of pollution control tax  
10 exemption and credit applications is set out by DOE rule implementing  
11 chapter 82-34 RCW. The rule, WAC 173-24-080, provides:

12 WAC 173-24-080 Approval of a Facility. The  
13 department shall approve any facility when:  
14 (1) It was installed or intended to be installed  
15 for the primary purpose of pollution control, and;  
16 (2) When it is operated or intended to be  
17 operated primarily for the purpose of pollution  
18 control, and;  
19 (3) When it is suitable, reasonably adequate,  
20 and meets the intent and purposes of chapter 70.94  
21 RCW or chapter 90.48 RCW;  
22 If the facility does not meet these criteria, it  
23 shall be denied.

24 In this case, DOE applied WAC 173-24-080(1). Since the three  
25 subsections are conjunctive, DOE disapproved Kaiser's application No.  
26 1659 when it found that subsection (1) was not met. The parties have  
27 agreed that the application of subsection (1) is the only issue before  
the Board in this case under WAC 173-24-080.

III

25 The meaning of WAC 173-24-080(1) is amplified in WAC 173-24-090  
26 which provides:



V

Also relevant to this matter, RCW 82.34.010(5) provides:

'Certificate' shall mean a pollution control exemption and credit certificate for which application has been made not later than December 31, 1969: Provided, That with respect solely to a facility required to be installed in an industrial, manufacturing, waste disposal, utility, or other commercial establishment which is in operation or under construction as of July 30, 1967, such application will be deemed timely made if made within one year after the effective date of specific requirements for such facility promulgated by the appropriate control agency.

Even were Kaiser's application No. 1659 filed in response to the requirements in DOE's order to commit to a course of action, the effective date of that requirement to commit is January 31, 1983. (See Finding of Fact XII, above, quoting the text of the order). While filed on November 30, 1981, the last day of the tax credit program, Kaiser's application was not "made within one year after the effective date" of that requirement to commit. Appellant has not shown that its application No. 1659 complies with RCW 82.34.010(5).

VI

Kaiser's application No. 971 for tax exemption and credit has not been decided by DOE. There being neither a decision nor order of DOE, we have no jurisdiction with regard to that application. RCW 43.21B.110 and -230.

VII

The disapproval by DOE of Kaiser's application for tax exemption and credit (No. 1659) should be affirmed.

PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
PCHB No. 83-28

VIII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The disapproval by Department of Ecology of Kaiser Aluminum and Chemical Corporation's application for tax exemption and credit (No. 1659) is affirmed.

Done at Lacey, Washington, this 29<sup>th</sup> day of December, 1984.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock  
GAYLE ROTHROCK, Chairman

(See dissenting opinion)  
LAWRENCE J. Faulk, Vice Chairman

William A. Harrison  
WILLIAM A. HARRISON  
Administrative Appeals Judge

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STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

KAISER ALUMINUM AND  
CHEMICAL CORPORATION,  
  
Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,  
  
Respondent.

PCHB No. 83-28

PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER (DISSENTING OPINION)

This matter, the appeal of pollution control tax exemption and credit application disapproved by the Department of Ecology, came on for hearing before the Pollution Control Hearings Board; Gayle Rothrock, Chairman, and Lawrence J. Faulk, Vice Chairman, convened at Lacey, Washington, on January 26, 1984. Administrative Appeals Judge

1 William A. Harrison presided. Respondent elected a formal hearing  
2 pursuant to RCW 43.21B.230.

3 Appellant appeared by its attorney Joanne Henry. Respondent  
4 appeared by Patricia Hickey O'Brien, Assistant Attorney General.  
5 Reporter Kim L. Otis recorded the proceedings.

6 Witnesses were sworn and testified. Exhibits were examined. From  
7 testimony heard and exhibits examined, the Pollution Control Hearings  
8 Board makes these

9 FINDINGS OF FACT

10 I

11 Appellant, Kaiser Aluminum and Chemical Corporation (Kaiser) owns  
12 and operates a primary aluminum reduction plant in Tacoma, Washington.

13 II

14 The plant includes potlines, known as Lines 1 and 2, constructed  
15 in the 1940's.

16 III

17 Kaiser filed application for tax credit No. 1659 on November 30,  
18 1981, seeking certification for portions of the construction of a  
19 modernized aluminum production line. This proposed project is known  
20 as Line V, and is a dual purpose facility designed to replace Lines 1  
21 and 2, which were originally constructed in approximately 1940. Lines  
22 1 and 2 have had persistent air pollution problems since the advent of  
23 regulations on this subject, specifically in the area of opacity and  
24 particulate violations.

25

26

27

PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
(DISSENTING OPINION) FCHB No. 83-28

IV

Regulations restricting the volume of particulate emissions from primary aluminum plants were first enacted effective in June, 1970. Within one year thereafter, Kaiser filed its first tax credit application for the proposed Line V, which was even then in the planning stages. This was DOE application number 971 and proposed a new pot line to replace Lines 1 and 2, which in 1970 and 1971 had on average exceeded the new particulate standards by almost 100%.

Application number 971 was accepted by DOE as timely, and by agreement was held in abeyance awaiting Kaiser's final determination to install the new line and, of course, test data once installation was commenced. As late as February 21, 1980, Richard P. Dittrich of the Department of Revenue confirmed that the 1971 application was "still open."

V

On August 10, 1981, as a result of a series of opacity violations from Lines 1 and 2, Kaiser received Regulatory Order No. 81-490 from DOE. This Order recognized Kaiser's continuing exploration of a plan to replace "the 1940's technology of Lines 1 and 2" and required that:

1. A commitment to a course of action either to abandon operation of lines 1 and 2 or to upgrade these lines to achieve compliance will be made by January 31, 1983.

V

DOE was aware in August, 1981, that Kaiser was still uncertain about possible construction of Line V, due to technical considerations, economic conditions and uncertainties as to the cost and availability of electric power. This was the primary reason that the "commitment" on the future of Lines 1 and 2 was deferred until January, 1983.

VI

In the fall of 1981, the legislature determined to terminate the pollution control tax credit program for all proposed facilities for which applications had not been filed by November 30, 1981. Kaiser accordingly prepared and filed a new application for the Line V project, as it was then contemplated and reflecting 1981 costs of \$165,615,000. It was noted in the cover letter that this application was "an updated version of Washington Application Number 971." The application itself recounted the background of the tax credit applications filed, withdrawn or certified for the Tacoma plant, and the history of the plant's lack of compliance with the 1970 particulate standards.

In addition to being an update and continuation of the timely 1971 application, the November 1981 application was filed within one year after regulatory order 81-490, which specifically required either replacement of Lines I and II with the proposed Line V or massive modifications to the old lines to bring them into compliance with existing opacity standards.



VII

By letter of January 24, 1983, Kaiser informed DOE that due to economy and energy situations, it had no timetable for completion of Line V to replace Lines 1 and 2.

VIII

On March 7, 1983, having reviewed it, DOE disapproved Kaiser's tax credit application No. 1659. In doing so, DOE stated:

The proposed project is not being done in response to any order, permit or regulation of the department.

From this Kaiser appealed to this Board on April 6, 1983.

IX

By letter of January 24, 1984, Kaiser informed DOE that due to economic developments, Kaiser cannot foresee circumstances developing in the short range (1-2 years) that would allow a commitment to complete Line V. No engineering plans for the completion of Line V have been requested by DOE nor furnished by Kaiser.

X

The issue to be decided by this Board is whether the Kaiser application (No. 1659) for tax credit for the Tacoma Line V project was "made within one year after the effective date of specific requirements for such facility promulgated by the appropriate control agency", as mandated by RCW 82.34.010(5).

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
(DISSENTING OPINION) PCHB No. 83-28

CONCLUSIONS OF LAW

I

Statutory exceptions from taxing laws are construed narrowly. International Paper v. Revenue, 92 Wn.2d 277, 279, 595 P.2d 1310 (1979), Evergreen-Washelli Memorial Park Co. v. Revenue, 89 Wn.2d 660, 663, 574, P.2d 735 (1978). The burden of proof to show that a tax credit or exemption should apply is on the appealing party.

II

The statute in question in this appeal is RCW 82.34.010(5), which defines "certificate" in the following terms:

(5) 'Certificate' shall mean a pollution control exemption and credit certificate for which application has been made not later than December 31, 1969; Provided, That with respect solely to a facility required to be installed in an industrial, manufacturing, waste disposal, utility or other commercial establishment which is in operation or under construction as of July 30, 1967, such application will be timely made if made not later than November 30, 1981, and within one year after the effective date of specific requirements for such facility promulgated by the appropriate control agency.

DOE has consistently taken the position that the "specific requirement" called for by the statute can be contained in either a permit or order specifically directed to the applicant's industrial plant (such as Regulatory Order 81-490) or a regulation applicable to the industry in general which sets new standards for particular levels of pollution, (such as the original WAC 18-52-030(2) setting particulate limits).

III

DOE's regulation on the subject is contained in WAC 173-24-090 and reads in pertinent part as follows:

A facility will be considered to be installed or intended to be installed for the primary purpose of pollution when:

(1) It was installed or intended to be installed in response to a requirement of the department or regional or local air pollution control authority contained in a permit, order or regulation which applies to the particular industry or a commercial establishment [in] question, and such facility meets or exceeds the requirements of such permit, order, or regulation . . . (Emphasis added.)

DOE appears to argue here that neither the 1970 particulate standards which generated the initial application for Line V nor the 1981 regulatory order which preceded the 1981 application are sufficiently "specific" to support the tax credit application in this case. I conclude, however, that there is no requirement in the statute, the above regulation or the case law that the "specific requirement for such facility" mandate installation of any particular treatment device, or order compliance with standards by any particular means. See International Paper v. Department of Revenue, 92 Wn.2d 277, 595 P.2d 1301 (1979), holding that a compliance schedule for generally applicable pollution requirements was the requisite "specific requirement," and which noted that DOE does not "have authority to require the installation of any particular pollution control equipment" although it does "review proposed engineering plans to determine adequacy and speediness of installation and operation." Id. at 280.

IV

In my judgement, the requirement contained in Regulatory Order 81-490 could hardly be more specific without exceeding the Department's authority in International Paper, supra, to direct general compliance with standards but not specific means to achieve that compliance. The Order recognizes Kaiser's in-progress installation of a 6-cell prototype for Line V and the ultimate potential replacement of the non-complying Lines 1 and 2. The Order directs specific "corrective action" which includes a decision to either proceed with the long-contemplated replacement of Lines 1 and 2 or to "upgrade" those lines to achieve compliance.

V

Kaiser's application No. 971 for tax exemption and credit has not been decided by DOE. There being neither a decision or order of DOE, we have no jurisdiction with regard to that application. RCW 43.21B.110 and .130.

VI

Kaiser's application for pollution control tax credit filed on November 30, 1981, was timely filed within one year after the effective date of a specific requirement for such facility by DOE. The Regulatory Order in question giving Kaiser the option to replace or substantially modify Lines 1 and 2 clearly contemplated installation of the facility now sought to be certified. Therefore the disapproval by DOE of Kaiser's application for tax exemption and credit (No. 1659) should be reversed.

PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
(DISSENTING OPINION) PCHB No. 83-28

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

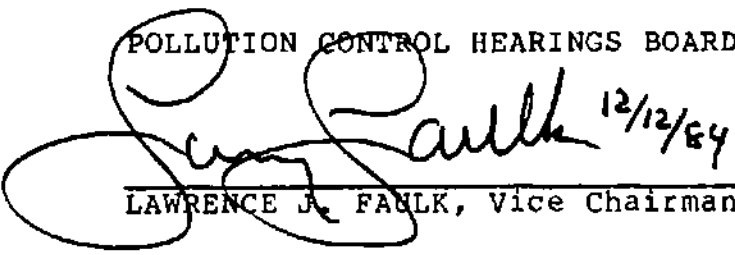
From these Conclusions the Board enters this

ORDER

The disapproval by the Department of Ecology of Kaiser Aluminum and Chemical Corporation's application for tax exemption and credit (No. 1659) is reversed and it is remanded to the Department of Ecology for consideration on its merits.

DONE this 29<sup>th</sup> day of December, 1984.

POLLUTION CONTROL HEARINGS BOARD

 12/12/84  
LAWRENCE J. FAULK, Vice Chairman